(2)

No. 89-1948

In the Supreme Court of the United States

October Term, 1990

ENCORE ASSOCIATES, INC.,
EUGENE P. WEISMAN
and JANE E. WEISMAN,
Petitioners

vs.

WILLARD C. SHINER and
RUTH M. SHINER,
Respondents

Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

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QUESTIONS PRESENTED FOR REVIEW

Whether the Pennsylvania Confession of Judgment Procedure, as applied in this case, is constitutional.

Whether an Appellate Court may award counsel fees for frivolous and obdurate conduct in the Appellate Courts.

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COUNTERSTATEMENT OF THE CASE

The Respondents, Willard C. Shiner and Ruth M. Shiner (hereinafter sometimes the "Shiners"), were the landlords under a lease dated October 1, 1981 (the "Lease") with tenant, Encore Associates, Inc. (one of the Petitioners) for premises located on Walnut Street, in the Shadyside District in the City of Pittsburgh. (Said premises are hereinafter referred to as the "Property"). Encore Associates is a corporation wholly owned by the other Petitioners, Eugene P. and Jane E. Weisman. (The tenant is hereinafter referred to as "Encore"; the Weismans are hereinafter referred to as the "Weismans".)

The term of the Lease was for six (6) years, commencing on October 1, 1981, and ending on September 30, 1987. The Lease also contained two (2) five-year options to renew. Pursuant to Paragraph 2 of the Lease, in order to exercise the first option to renew, notice of the exercise of the option must have been given at least six (6) months prior to the expiration of the original term of the Lease, or no later than March 31, 1987.

On or about April 21, 1987, Encore first sent to the Shiners a notice of the exercise of the first option of the Lease. On April 22, 1987, the Shiners immediately wrote back to Encore, advising that since the exercise of the option was untimely, the Lease would not be extended past September 30, 1987, and that the tenant should vacate the premises on or before that date.

On or about August 23, 1987, the Petitioners, Encore and the Weismans, filed an Action in Equity against the Shiners in the Court of Common Pleas of Allegheny County at No. GD87-13537. In that action, Encore sought an Order enjoining the Shiners from showing the leased

premises to prospective tenants and from evicting the tenant from the Property after September 30, 1987.

A hearing was held on September 29, 1987, before the Honorable Eugene B. Strassburger, III, on Encore's request for a preliminary injunction. At that hearing, Eugene B. Weisman, a Petitioner, and Michael Haggerty, manager of Encore's business establishment known as "Brendan's", testified in support of their request for a preliminary injunction. In addition, thirty-two (32) exhibits were introduced into evidence.

By Order of Court dated September 30, 1987, Judge Strassburger denied Petitioners' request for preliminary injunction. Subsequent thereto, he filed an Opinion in support of the Order, which Opinion is attached to the Petition at page 32a. The Weismans appealed from that Order on October 6, 1987 to the Superior Court at No. 1411 PGH. 1987. On October 7, 1987, Judge Strassburger denied the Petitioners' request for a supersedeas presented to him, noting that it was in actuality a request for an injunction pending appeal.

On October 5, 1987, the Shiners confessed judgment for possession against the Petitioners in the Court of Common Pleas, Allegheny County, at No. GD87-17492.

On October 9, 1987, the Petitioners filed an Application for Stay or Injunction Pending Appeal to the Superior Court at No. 1411 PGH. 1987, which Application was denied. On October 13, 1987, the Petitioners filed an Amended Application for Stay or Injunction Pending Appeal, to which the Respondents filed an Answer, and which Amended Application was denied on October 13, 1987. The Petitioners appealed the denial of their

Amended Application for Stay or Injunction to the Pennsylvania Supreme Court at No. 92 WD Misc. Docket on October 14, 1987. This Application was granted by Justice Zappala of the Pennsylvania Supreme Court on October 15, 1987, pending the filing of an Answer by the Respondents, which Answer was due by October 19, 1987.

In the meantime, in order to avoid the impending eviction, Encore filed a Bankruptcy Petition with the Bankruptcy Court for the Federal District Court of the Western District of Pennsylvania at No. 87-2794 on October 15, 1987. As a result of the filing of the Bankruptcy Petition, the Pennsylvania Supreme Court rescinded its October 15, 1987 Order granting a temporary injunction pending appeal, on October 21, 1987.

Prior to the bankruptcy filing, the Petitioners filed a Petition to Open the Judgment Confessed in Ejectment, seeking to open the confessed judgment against them for possession at No. GD 87-17492 of the Court of Common Pleas of Allegheny County, Pennsylvania. The Petition to Open Judgment was presented on October 13, 1987 to the Honorable I. Martin Wekselman who refused to issue a rule on the same. Subsequently, Judge Wekselman filed an Opinion in support of said denial, which Opinion referred to Judge Strassburger's Opinion denying the request for a preliminary injunction in determining that no colorable claim for relief was presented. This Opinion is attached to the Petition for Writ of Certiorari at page 42a. On October 29, 1987, the Petitioners appealed Judge Wekselman's October 13, 1987 Order to the Superior Court at No. 1508 PGH. 1987.

Due to the bankruptcy filing, the Shiners were prohibited from executing upon their Writ of Possession obtained as a result of the judgment confessed at No. GD 87-17492

in the Court of Common Pleas of Allegheny County. The Shiners duly filed a Motion for Relief from the automatic stay provisions of the Bankruptcy Code. This Motion was granted by the Honorable Bernard Markowitz on November 24, 1987 following argument and hearing based upon the representations of counsel.

At this point, the Petitioners commenced what can only be described as an all-out legal assault in five (5) different courts as follows:

On December 3, 1987, the Weismans filed an Application to reinstitute the earlier rescinded stay (which was only a temporary stay to allow the filing of a response) in the Pennsylvania Supreme Court at No. 92 WD Misc. Docket. On December 4, 1987, the Bankruptcy Court's Motion granting Relief from Stay was appealed to the United States District Court, Western District. On December 7, 1987, a Petition to Strike the October 5, 1987 confessed judgment was presented in the Court of Common Pleas of Allegheny County to the Honorable Ralph A. Smith, who took the same under advisement. On December 9, 1987, yet another Motion for a preliminary injunction was presented to the Honorable Eugene B. Strassburger, III, based upon amended pleadings filed in the equity matter at No. GD 87-13537 in the Court of Common Pleas of Allegheny County. This Motion was summarily denied by Judge Strassburger on December 9, 1987, and an Opinion was filed in support thereof on December 10, 1987, which Opinion is attached to this Brief at page RA-1. Judge Strassburger's denial of the Motion was also immediately appealed to the Superior Court on December 9, 1987, at No. 1694 PGH. 1987. This notice of appeal was also accompanied by a Motion for Stay or Supersedeas Pending Appeal. Also on December 9, 1987, a Motion for

Stay Pending Appeal was presented to the Honorable Bernard Markowitz of the Bankruptcy Court requesting a stay of his Order granting Relief from Stay pending the appeal of said Order to the United States District Court. This Motion was denied by Judge Markowitz by Order and Opinion dated the same day.

On December 10, 1987, a temporary stay was granted in the appeal at No. 1694 PGH. 197 in the Superior Court (from Judge Strassburger's denial of the re-presented Motion for an injunction pending appeal). This temporary stay was rescinded the same day following the filing of an Answer by the Respondents' counsel and of Judge Strassburger's Opinion. On December 11, 1987, a Motion for Reconsideration of the rescinded stay was filed.

Meanwhile, in the Pennsylvania Supreme Court, the application to reinstitute the stay pending appeal was denied on December 7, 1987 by the Honorable Justice Papadakos. An application for reconsideration by the entire Court of the Order denying the stay was filed on December 8, 1987, with the Pennsylvania Supreme Court.

On December 10, 1987, Petitioners filed a Motion for Stay with the United States District Court, Western District, seeking to stay the Bankruptcy Court Order granting the Shiners relief from the automatic stay provisions of the Bankruptcy Code. Argument on said Motion was heard on December 11, 1987, and on December 14, 1987, the Honorable Gustave Diamond filed an Order and Opinion denying said request.

Judge Diamond's Order was appealed to the United States Court of Appeals, Third Circuit, on December 14, 1987. On December 15, 1987, Petitioners presented to the Honorable Joseph F. Weis of the United States Court of

Appeals, Third Circuit, an Emergency Motion for Stay or Injunction Pending Appeal. This Motion was submitted to a panel of said Court on December 16, 1987, by briefs. On December 17, 1987, the United States Court of Appeals for the Third Circuit, per Judges Weis, Stapleton and Garth, denied the Motion.

Meanwhile, Judge Smith entered an Order on December 15, 1987, denying the Petition to Strike the confessed judgment, which Petition he had had under advisement since December 7, 1987. This Order was immediately appealed to the Superior Court on December 15, 1987 at No. 1715 PGH. 1987. A Motion for Stay pending that appeal was presented to Judge Smith at the trial court level, denied on December 16, 1987, and presented to the Superior Court on December 17, 1987. It was temporarily granted and subsequently vacated the same day following the filing of a response thereto by the Respondents.

On December 17, 1987, Encore was duly evicted from the Property.

All four of the aforementioned appeals in the Superior Court were consolidated for briefing and argument before the Superior Court. By Opinion and Order dated October 28, 1988, the Superior Court affirmed the trial courts on all four appeals.

A Petition (RA-2) was then filed in the Superior Court, requesting the Superior Court to award counsel fees for the filing of frivolous appeals and motions in this matter. The Petition was very limited, and only addressed three of the many motions and appeals which were filed:

(1) one-quarter of the costs in briefing and arguing the appeals, representing the second appeal from

Judge Strassburger's refusal to issue an injunction;

(2) the costs of responding to the motion for stay in the appellate courts, on the second appeal from Judge Strassburger's Order; and

(3) the costs of responding to the motion for stay in the appellate courts on the appeal from Judge Smith's Order, representing the third set of motions for stay filed in the appellate courts.

By Order dated December 1, 1988, the Superior Court awarded counsel fees, but remanded the case to the trial court to determine the actual amount of the award.

Continuing their practice in the appellate courts, the Petitioners filed a Motion for Reconsideration of the Counsel Fees Order with the Superior Court. By Order dated December 23, 1988, the Superior Court denied the Motion for Reconsideration.

The Petitioners also filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania with regard to two of the four appeals decided by the Superior Court. These were the appeals from the Orders of Judges Wekselman and Smith, relating to the confession of judgment for possession. That Petition was docketed in the Supreme Court at 633 W.D. Allocatur Docket 1988. Thereafter, Petitioners filed a second Petition for Allowance of Appeal with the Supreme Court, with regard to the award of attorneys' fees. This Petition was docketed at No. 53 W.D. Allocatur Docket 1989.

By Order dated March 12, 1990 (P-1a) the Supreme Court of Pennsylvania refused to hear either matter. Thereafter, on May 24, 1990, Judge Strassburger assessed

the attorneys' fees awarded by the Superior Court at $2,564.00.

REASONS FOR DENYING THE WRIT

I. THE PENNSYLVANIA CONFESSION OF JUDGMENT PROCEDURE IS CONSTITUTIONAL AS WRITTEN AND AS APPLIED IN THIS CASE.

A. This Issue Is Waived Because It Was Not Raised In The Lower Court.

This Petition for Certiorari concerns the two cases for which Petitions for Allowance of Appeal were filed in the Pennsylvania Supreme Court, being only two of the four cases which were decided by the Pennsylvania Superior Court.

One of the two cases involves the Petition to Open the Confessed Judgment. The grounds for said petition are set forth on page 13 of the Petition for Writ of Certiorari. No constitutional issues are set forth therein.

The other case involves the Petition to Strike the Confessed Judgment. The grounds for that Petition are set forth on pages 16 and 17 of the Petition for Writ of Certiorari. No constitutional issues are set forth therein. Also, a review of the decision of the Superior Court (P.3a) indicates that no constitutional issues were raised or considered.

It is well settled that the United States Supreme Court will generally not consider issues which were not raised in the lower courts, *Lawn v. United States*, 335 U.S. 339, 2 L.Ed. 2d 321, 78 S.Ct. 311, (1958) *reh. den.* 355 U.S. 967, 2

L.Ed. 2d 542, 78 S.Ct. 529. This is especially true on petitions coming to the Supreme Court from the state courts. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 84 L.Ed. 849, 60 S.Ct. 670 (1940). Thus, the constitutional claims raised in the Petition for Writ of Certiorari are not properly before this Court.

B. Under Relevant Case Law, The Pennsylvania Confession Of Judgment Procedure Is Constitutional.

Despite Weismans' contentions that Pennsylvania's confession of judgment procedure is unconstitutional, the bottom line is that neither the United States Supreme Court, nor Pennsylvania courts have so held. In *Swarb v. Lennox*, 405 U.S. 191, 92 S.Ct. 767, 31 L.E.2d 138 (1972), the court simply limited the use of confession of judgment to individuals whose conjugal income exceeded $10,000.00. In *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 774, 31 L.E.2d 124 (1972), the court upheld judgment by confession where the party has knowingly and voluntarily waived his due process rights.

Recently, the Pennsylvania Superior Court rejected the contention that the confession of judgment provisions was unconstitutional, in *Federman v. Pozsonyi*, 365 Pa. Super. 324, 529 A.2d 530 (1987). The court stated:

> Contrary to appellant's assertions, both *Overmeyer* and *Swarb* uphold the constitutionality of cognovit provisions where there has been a voluntary, knowing and intelligent waiver of the party's due process rights. A review of the record in the instant action convinces us that appellant knowingly, voluntarily, and intelligently waived his due process rights and agreed to the confession of judgment provision. Appellant negotiated the drafting of the lease through his attorney, and

> the lease itself reflects the various deletions and additions made pursuant to such negotiations. 365 Pa. Super. at 329-330, 529 A.2d at 533.

It is beyond doubt then that Pennsylvania's confession of judgment procedure is constitutional, especially in the commercial lease context. The facts of the instant case fall well within the parameters of *Federman's* requirement of knowing and voluntary waiver. Petitioners were represented by Attorney Lawrence Weiner in the negotiating and drafting of the Lease, including the cognovit clause. Indeed, at Mr. Weiner's insistence, a change was made in the cognovit clause (the insertion of a twenty (20) day notice provision) before the clause was inserted into the Lease. Attorney Weiner's involvement in the cognovit clause negotiations is evidence of a knowing and voluntary waiver. Thus, the confession of judgment process utilized in this case was constitutional, both on its face and as applied.

Additionally, the Weismans were not poor, uneducated people signing a contract of adhesion containing a confession of judgment clause. Rather, the Weismans are millionaires, probably many times over, who are very experienced in business. The Lease which is the subject of this dispute was carefully negotiated between the parties.

In addition, in order to address the decision in *Swarb v. Lennox, supra.*, the Pennsylvania Rules of Civil Procedure were amended in 1973 by adding a new sentence to subdivision (e) of Rule 2959, stating that, in the petition to open judgment process, if the defendant produces evidence which, in a jury trial, would require the issues to be submitted to a jury, the court shall open the judgment. This small burden of proof in opening confessed judgments meets constitutional requirements. As the court said in

Chittester v. LC-CD-F Employees of G.E. Federal Credit Union, 384 F.Supp. 475 (W.D. Pa. 1974), "Relief from the judgment may be secured by the procedures provided in Pa. R.C.P. 2954, and since December 1, 1973, the burden of proof on the Petitioner/Debtor to open judgment is the same as that under the Ohio practice which received Justice Douglas' approval in his concurring opinion in *Overmeyer v. Frick*, 405 U.S. 174, 190, 92 S.Ct. 775, 31 L.E.2d 124 where he characterized it as a 'minimal obstacle.' "

Thus, the Pennsylvania confession of judgment procedure meets all constitutional standards.

C. Judge Wekselman Properly Relied Upon The Prior Decision Of Judge Strassburger In Refusing To Issue A Rule To Show Cause On The Petition To Open Confessed Judgment.

1. Judge Strassburger's decision precluded the Petitioners from opening judgment.

Standard Pa. Practice 2d, Section 71.110 declares that:

> A judgment debtor may be precluded from securing relief in proceedings to open a judgment by a decision in a prior proceeding in equity between the same parties involving the same questions, and even by the pendency of such a suit in equity.
>
> Where a defendant has an election to proceed in equity to restrain the enforcement of a judgment, or to proceed by a rule to open the judgment, and he adopts one mode of proceeding and is defeated, he may not thereafter obtain a rehearing

> of the same matter by adopting the other mode of proceeding.

In *Sherwood Brothers Company v. Kennedy*, 132 Pa. Super. 154, 200 A. 689 (1938), the Pennsylvania Superior Court considered the question whether a defendant in a judgment confessed by warrant of attorney could file a bill in equity to restrain enforcement of the judgment where it was required to proceed by petition to open the judgment. The Court concluded that inasmuch as both actions lay in equity, the defendant in a judgment confessed had the election to proceed either by a bill in equity or by a petition to open the judgment.

The Superior Court relied upon the case of *Gordinier's Appeal*, 89 Pa. 528 (1879), in reaching its decision, and cited with approval the court's finding in that case that:

> We do not understand this to mean that when there has been a motion on equitable grounds for an injunction which has been fully heard, and refused, that afterwards a bill in equity will be entertained on the same grounds. It seems to us to mean that the defendant had a choice of remedies, by motion or bill; if he had chosen the latter he could have had an appeal to the Supreme Court. If the party may try his chances on motion and, if he fails, sustain a bill afterwards, it tends to multiplicity of action; for that is the course parties will be likely to pursue. Thus a court of competent jurisdiction will have to hear the same matter twice . . . (cited at 200 A.690).

The aforementioned principle upon which *Gordinier's Appeal* was decided and which was cited with approval in *Sherwood Brothers* is precisely applicable to defeat the Petitioners' claim that Judge Wekselman could have

issued a rule on their petition. It is worthwhile to examine the policy behind the aforestated principle.

It is clear that the Pennsylvania Supreme Court's concern in *Gordinier's Appeal* affected multiplicity of actions both in the judicial system and upon the participants involved. It concluded that in the interest of equity, and especially when both proceedings, as in the present case, lie in equity, a party should not be entitled to litigate the same claim twice.

The fairness of this approach is manifested in the within case. The Petitioners chose to proceed with an injunction action to enjoin the Shiners from evicting them from the premises, whether by way of a confessed judgment or other legal proceeding. They were granted a full hearing by a court in equity on their injunction action. Although they now claim that the standard of review applicable to that proceeding prevents it from barring subsequent proceedings, it should be noted that it was *their* choice to proceed with the injunction action rather than proceeding by petition to open judgment. Having elected their remedy, they were not entitled to proceed with a petition to open judgment when their first action failed.

The Petitioners overlook, or perhaps ignore, the fact that all of their "equitable reasons" for opening the judgment were previously presented before Judge Strassburger and developed through extensive testimony based upon their own choice of forum, in the Petitioners' initial request for a preliminary injunction. Having heard the testimony, and in a carefully reasoned Opinion, Judge Strassburger concluded that:

> Thus, under neither of the alternative theories did Plaintiffs show *any* right to relief, let alone a clear

right, and therefore the prerequisite for the granting of a preliminary injunction was not met. (emphasis in original) (P.41a).

Judge Wekselman properly referred to this judicial finding in refusing to issue a Rule to Show Cause why the judgment should not be opened. Petitioners argue that the party seeking a Rule to Show Cause why a judgment should not be opened need only allege in its pleadings such facts as would constitute a meritorious defense. As explained below, the Petitioners did not do so. Nevertheless, Petitioners attempt to have the Courts of Common Pleas of this Commonwealth ignore judicial proceedings and opinions by colleagues in the same court hearing the same case on the same facts, ruling instead only on the pleadings before it. This is not the way a judicial system should operate and it has been recognized by the Pennsylvania Supreme Court that individual cases are not to be viewed as isolated matters independent of related events. *See Yadacufski v. Commonwealth of Pennsylvania, Department of Transportation*, 499 Pa. 605, 454 A.2d 923 (1982).

2. The Petition to Open Judgment did not raise any issues that could lead to the judgment being opened.

The Petitioners argue that their Petition to Open Judgment raises a number of equitable reasons for opening the judgment. A close review of the Petition, however, demonstrates that the Petition sets forth only the same facts which were presented before Judge Strassburger and the same legal theories in support thereof. The Appellants continue to argue that inadvertence is a sufficient excuse to justify their failure to timely exercise the option.

The following was averred by Encore at Paragraph 17 of its Petition to Open Judgment:

> Through an act of inadvertence on the part of the manager of Encore Associates, Inc., the written notice of the intent to exercise the option for an additional term of five years beyond September 30, 1987, was not mailed until April 21, 1987, and was some 21 days late.

Thus, in its own Petition, Encore admitted that it had no legal excuse for the late exercise of the option.

The Pennsylvania Supreme Court has repeatedly held that "time is *always* of the essence in an option contract." (emphasis added) *New Eastwick Corp. v. Philadelphia Builders*, 430 Pa. 46, 50, 241 A.2d 766, 769 (1968). *See also Phillips v. Tetzner*, 357 Pa. 43, 45, 53 A.2d 129, 131 (1947) (citing cases). The court in *Western Savings Fund Society of Philadelphia v. Southeastern Transportation Authority*, 285 Pa. Super. 187, 427 A.2d 175 (1981) *en banc*, stated:

> It is a sound legal principle that unless an option is exercised within the time fixed it necessarily expires: *McMillen v. Philadelphia Company*, 159 Pa. 142, 28 A. 220 [(1893)]; *Vilsack v. Wilson*, 269 Pa. 77. 112 A. 17 [(1920)]; *Rhodes v. Good*, 271 Pa. 117, 114 A. 494 [(1921)]; *Loughey v. Quigley*, 279 Pa. 396, 124 A. 84 [(1924)]. *Phillips v. Tetzner*, 357 Pa. 43, 45, 53 A.2d 129, 131 (1947). This is so because "time is *always* of the essence in an option contract." [emphasis added] *New Eastwick Corporation v. Philadelphia Builders*, 430 Pa. 46, 50, 241 A.2d 766, 769 (1968). Cf. 6 Williston on Contracts, § 853 at 212 (3d Ed. 1962) ("whether the question arises either at law or in equity it is settled that 'time is of the essence of an option' " *Id.* at 212-13 (footnote omitted)). *Accord, Unatin 7-Up*

Company, Inc. v. Solomon, 350 Pa. 632, 39 A. 2d 835 (1944). (427 A. 2d at page 178).

It is clear, then, that the Petition to Open Judgment, on its face, raised no issues that created a jury question. Thus, Judge Wekselman's decision, refusing to issue a rule on the Petition, was appropriate.

D. The Petition to Strike Judgment Did Not Set Forth Grounds Therefor, And The Petitioners Waived All Arguments Contained Therein.

1. The Petitioners waived the issues presented in their Petition to Strike by failing to include the same in their earlier filed Petition to Open the Confessed Judgment.

As earlier noted, the Petitioners within are adept at presenting slight variations of their same basic cause of action to proceed in different procedural formats. Thus, having already presented their Petition to Open Judgment to Judge Wekselman, and then appealing their loss to the Superior Court, they subsequently filed a Petition to Strike the Confessed Judgment on December 7, 1987, and presented the same to the Honorable Ralph A. Smith.

This new Petition clearly violates Pennsylvania Rule of Civil Procedure 2959, which provides that:

> (A) Relief from a judgment by confession shall be sought by petition. *All grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single petition.*
>
> . . .

(C) The party waives all defenses and objections which he does not include in his petition or answer. (emphasis added).

The Pennsylvania courts have never retreated from a strict application of this rule. In *Leasing Service Corporation v. Benson*, 317 Pa. Super. 439, 464 A.2d 402 (1983), the Superior Court upheld the lower court in dismissing a "Supplemental Petition to Open Judgment." The Superior Court reviewed the trial court's decision as follows:

> The lower court's action regarding the Appellant's Supplemental Petition was clearly justified, and limits our consideration to the question of . . . the remaining claims as to the allegedly improper rental charges, other matters included in the Supplemental Petition, were not properly raised in the lower court and therefore may not be considered by us on this appeal. Pa. R.C.P. 2959(a) and (c). (464 A.2d at page 408).

2. Even if the Petitioners' issues were not waived, the issues contained in their Petition were without merit.

Even assuming *arguendo* that the Petitioners could properly present their Petition to Strike to Judge Smith, it is clear that, based upon their own admission, the judgment may be stricken only if it contains a fundamental or vital defect, i.e., where the plaintiff had no right to enter the judgment. Judge Smith, who dismissed the Petition based upon the Pennsylvania Rules of Appellate Procedure, Rule 1701, nevertheless treated the merits of the Petitioners' contention and concluded that they demonstrated no fundamental defect in the Respondents' confessed judgment.

The Petitioners argue that the warrant of attorney expired with the expiration of the term of the Lease. As Judge Smith properly pointed out in his written Opinion, such an argument would emasculate the warrant of attorney for judgment for possession. There is no need for a judgment for possession during the term of a valid and existing lease, because there is no right to evict the tenant. A judgment for possession is only needed when the term of the lease has ended, for example, as the result of the tenant failing to pay rent or, as in this case, unlawfully holding over after the natural expiration of the term of the lease. In other words, according to Petitioners' reasoning, a confession of judgment for possession would never be proper because it can only be used during the term of the lease when there is no right to evict the tenant. Obviously, such an interpretation leads to an absurd result and/or a ruling that confession of judgment for possession is never proper, despite the fact that confessed judgments for possession in Pennsylvania are valid, even in residential leases. *Federman v. Pozsonyi*, 365 Pa. Super. 324, 529 A.2d 530 (1987).

For all of the foregoing reasons, Judge Smith's Order denying the Petition to Strike Judgment was clearly proper and should be affirmed.

E. Conclusion

The issues raised in the Petition for Writ of Certiorari are essentially state law issues. (*See*, in particular, pages 32-40 of the Petition). Purely state law issues are obviously not of paramount concern to the United States Supreme Court.

To the extent federal constitutional issues are involved, the principles involved in evaluating the confession of judgment procedure were completely enunciated in *D.H. Overmeyer Co., Inc. v. Frick Company, supra.* There has been no request or suggestion by Petitioners that the rule in *Overmeyer v. Frick* be changed. In fact, Petitioners rely on that case as a basis for their legal arguments. In other words, the Petitioners are merely seeking an application of law to fact which is also not grounds for a grant of certiorari by the United States Supreme Court. Therefore, the Petition for Writ of Certiorari should be denied.

II. THE IMPOSITION OF COUNSEL FEES BY THE SUPERIOR COURT WAS PROPER.

A. No Award Of Counsel Fees Was Made With Regard To The Appeal From Judge Smith's Order.

The award of counsel fees for frivolous appeals is clearly a matter of state law, raising no federal constitutional issues. In order to attempt to raise a federal issue, Petitioners contend that the Superior Court imposed counsel fees against Petitioners for their appeal from the lower court's order refusing to strike the judgment (Petition, p. 41). This is an absolute misstatement of the facts.

Attached to this Brief is the Application For An Award of Reasonable Counsel Fees (RA-2). On the merits of the four cases, the only appeal for which counsel fees were sought, and awarded, was the appeal from the second decision of Judge Strassburger. There was no request for counsel fees on the appeal from Judge Smith's Order refusing to strike the judgment.

There were counsel fees awarded on a stay request in the Superior Court, after the appeal from Judge Smith's Order. That was because that stay request was approximately the fifteenth of seventeen stay or injunction requests made in this case. However, it is clear that no fees were sought, or awarded, on the appeal of the merits of Judge Smith's decision.

B. The Petitioners' Undisputed Conduct In This Case Was Clearly Improper, And Justified The Award Of Counsel Fees.

The award of counsel fees by the Superior Court was made pursuant to Rule 2744 of the Pennsylvania Rules of Appellate Procedure. That Rule states, in pertinent part:

> [A]n appellate court may award as further costs damages as may be just, including
>
> (1) a reasonable counsel fee and
>
> (2) damages for delay at the rate of 6% per annum in addition to legal interest,
>
> if it determines that an appeal is frivolous or taken solely for the delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious.

The Superior Court had the complete record in all four cases when it made its decision on the four consolidated appeals. The Superior Court spent twelve pages of its opinion (P.3a-15a) to summarize the repetitive appeals and requests for stays and injunctions in this matter. In all, seventeen (17) different requests for stays or injunction were denied by the Court of Common Pleas of Allegheny

County, the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania, the Bankruptcy Court and Federal District Court for the Western District of Pennsylvania, and the Third Circuit Court of Appeals. Counsel fees were properly imposed in this case.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request this Honorable Court to deny the Petition for Writ of Certiorari.

DATED: July 9, 1990

Respectfully submitted,

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RESPONDENTS' APPENDIX

ENCORE ASSOCIATES, INC.,
a Pennsylvania corporation
and EUGENE P. WEISMAN and
JANE E. WEISMAN,
Plaintiffs

v.

WILLARD C. SHINER and
RUTH M. SHINER,
Defendant

No. GD87-13537

OPINION

STRASSBURGER, J.

The relief sought herein was denied three times by this judge, once by Judge Wekselman of this court, twice by the Superior Court, twice by the Supreme Court and once by the Bankruptcy Court. Litigation must end at some point. It is suggested that the Superior Court impose counsel fees upon Appellants and/or their counsel.

STRASSBURGER, J.

December 10, 1987

IN THE

Superior Court of Pennsylvania

SITTING AT PITTSBURGH

No. 1694 PGH 1987

ENCORE ASSOCIATES, INC.,
a Pennsylvania corporation and
EUGENE P. WEISMAN and JANE E. WEISMAN,
Appellants,

VS.

WILLARD C. SHINER and
RUTH M. SHINER,
Appellees.

No. 1725 PGH 1987

WILLARD C. SHINER and
RUTH M. SHINER, his wife,
Appellees,

VS.

ENCORE ASSOCIATES, INC.,
a Pennsylvania corporation,
Appellant.

APPLICATION FOR AN AWARD OF REASONABLE COUNSEL FEES PURSUANT TO Pa. R.A.P. 2744

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APPLICATION FOR AN AWARD OF REASONABLE COUNSEL FEES PURSUANT TO PA. R.A.P. 2744

AND NOW, COME the Appellees, by their undersigned counsel, and file the within Application upon the following averments:

1. The two above appeals, along with the appeals filed at 1411 PGH 1987 and 1508 PGH 1987 were consolidated for briefing and argument by an Order of the Superior Court of Pennsylvania.

2. By Orders dated October 28, 1988, accompanied by a Memorandum Opinion, the Superior Court, by Cirillo, P.J., Rowley and Tamilia, J.J., affirmed all four Orders of the lower court.

3. Attached hereto as "Exhibit A" is the Opinion of the Superior Court; attached hereto as "Exhibit B" is the Brief of the Appellants, and attached hereto as "Exhibit C" is the Brief of the Appellees.

4. This Application is being filed pursuant to Pa. R.A.P. 2744, because an appeal filed by the Appellants was frivolous and taken for delay, and the conduct of the Appellants in two of the appeals was obdurate and vexatious.

1694 PGH 1987

5. This was an appeal from the Order of Strassburger, J., entered on December 9, 1987, at GD87-13537, Court of Common Pleas of Allegheny County, Pennsylvania.

6. Judge Strassburger had previously held a full hearing on the Appellants-Plaintiffs' request for a preliminary injunction on September 29, 1987, had denied the request

by Order dated September 30, 1987, and then supported his decision with an Opinion dated October 15, 1987.

7. More than two (2) months later, Appellants-Plaintiffs returned to Judge Strassburger to amend their pleadings in the equity action and then asked once again for the same preliminary injunction that had previously been denied by Judge Strassburger.

8. Judge Strassburger denied the Motion for Preliminary Injunction on December 9, 1987.

9. The Appellants-Plaintiffs immediately filed an appeal to the Superior Court and asked Judge Strassburger for a stay pending appeal.

10. By Order dated December 10, 1987, Judge Strassburger denied the request and filed the following Opinion.

> The relief sought herein was denied three times by this judge, once by Judge Wekselman of this court, twice by the Superior Court, twice by the Supreme Court and once by the Bankruptcy Court. Litigation must end at some point. *It is suggested that the Superior Court impose counsel fees upon Appellants and/or their counsel.* (emphasis added) (Appellants' Brief, p. 18b).

11. The sole purpose of filing this second appeal from Judge Strassburger's decisions was to enable Appellants-Plaintiffs to make a third request to the Superior Court for a stay pending appeal (as is more fully set forth in the next section of this Application), thereby once again delaying the eviction of the Appellants-Plaintiffs from the demised premises which were the subjects of these lawsuits.

12. The Superior Court, in affirming Judge Strassburger's decision in this appeal, stated:

> The trial court found appellants previously raised the same issues in the prior petitions to set aside the confessed judgment and the first petition for a preliminary injunction. We have reviewed the petition in conjunction with all those prior to it and agree with the court below. (Slip Opinion, p.17)

13. While it could be argued that the filing of four appeals to the Superior Court with regard to one lease is in itself frivolous, obdurate and vexatious, or that some of the other appeals involved in this matter were themselves frivolous, obdurate and vexatious, this part of the Application has been averred narrowly to cover the only appeal that is *clearly* frivolous, obdurate and vexatious.

14. In this appeal, the Appellants-Plaintiffs made a second request to Judge Strassburger for the same relief he had previously denied and then took a second appeal to Superior Court, solely in order to file a third Motion for Stay Pending Appeal.

15. The conduct of the Appellants-Plaintiffs in this appeal was frivolous, obdurate and vexatious and justifies the imposition of reasonable counsel fees.

WHEREFORE, the Appellees respectfully request this Honorable Court to order:

a) Appellants to pay one-quarter (1/4) of the reasonable counsel fees of Appellees in prosecuting its defense of the consolidated appeals, including, but not limited to, briefing and arguing the appeals, or a reasonable multiplier thereof,

b) Appellants to pay all of the reasonable counsel fees of Appellees in preparing this Application, and

c) that the amount of said fees be taxed in the lower court at GD87-13537, pursuant to Pa. R.A.P. 2761.

1694 PGH 1987 and 1715 PGH 1987

16. After Judge Strassburger made his initial determination on September 30, 1988, the Appellants-Plaintiffs appealed to the Superior Court at 1411 PGH 1987, and then the following activity took place:

a) They asked Judge Strassburger for an injunction pending appeal, which was denied on October 7, 1987 (R. 409a).

b) On October 9, 1987, they filed an Application for Stay or Injunction Pending Appeal to Superior Court (R. 410a), which was denied.

c) On October 13, 1987, they filed an Amended Application for Stay or Injunction Pending Appeal, which was denied the same day (Slip Opinion, p.5).

d) They appealed that denial to the Supreme Court, and after some procedural complications, their request was denied by the Honorable Justice Nicholas P. Papadakos, on December 7, 1987 (Slip Opinion, p. 8).

e) An application for reconsideration by the entire Supreme Court was filed on December 8, 1987 and subsequently denied (Slip Opinion, p. 8).

17. No claim is being made at this time that these motions were frivolous, obdurate or dilatory, as these were the first set of motions through the state appellate court system.

18. The Appellants-Plaintiffs also tried to stay the eviction in this matter by filing for bankruptcy on October 15, 1987. The Appellees' Motion for Relief from Stay was granted on November 24, 1987 by the Honorable Bernard Markowitz. The following activity then took place:

a) On December 9, 1987, a Motion for Stay Pending Appeal was presented to Judge Markowitz and denied that day.

b) A Motion for Stay was filed with the District Court and denied by the Honorable Gustave Diamond on December 14, 1987 (Slip Opinion, p. 8).

c) Judge Diamond's Order was appealed to the United States Court of Appeals for the Third Circuit, which was denied by a panel of that Court on December 16, 1987 (Slip Opinion, p. 9).

19. No claim is made at this time that these Motions were frivolous, obdurate or dilatory, as these were the only Motions for Stay filed at that time in the federal court system.

20. At 1694 PGH 1987, which is the second appeal from a decision of Judge Strassburger, the following activity took place after Judge Strassburger's decision.

a) By Order dated December 10, 1987, although made the day before, Judge Strassburger denied the request for an injunction pending appeal. (Appellants' Brief, p. 18b)

b) On December 9, 1987, a Motion for Stay or Supersedeas Pending Appeal was filed in the Superior Court, which did not highlight the prior Orders of the Superior Court and Justice

Papadakos denying the same requests at No. 1411 PGH 1987 (R. 619a).

c) Accordingly, on December 10, 1987, the Superior Court entered a temporary stay (R. 446a).

d) The Appellees immediately filed an Answer to the Motion, referencing the prior denials in the Superior Court and the Supreme Court, and on December 11, 1987, the Superior Court vacated the stay (R. 447a).

21. At 1715 PGH 1987, which is an appeal from a decision of the Honorable Ralph Smith entered on December 15, 1987, denying a Petition to Strike Confessed Judgment, the following activity took place after Judge Smith's decision.

a) By Order dated December 16, 1987, Judge Smith denied a Motion for Stay Pending Appeal (Slip Opinion, p. 9).

b) An Emergency Motion for Stay or Supersedeas was then filed in the Superior Court on December 16, 1987, which, once again, did not highlight the prior Orders of the Superior Court and Justice Papadakos denying the same requests at No. 1411 PGH 1987 and by the Superior Court at 1694 PGH 1987, and which was filed just five days after the Superior Court had vacated the stay at 1694 PGH 1987 (Slip Opinion, p. 9).

c) Accordingly, on December 17, 1987, the Superior Court granted the Emergency Motion (Slip Opinion, p. 9).

d) A Motion for Reconsideration, outlining all of the prior Orders, was immediately filed with the Superior Court, and the Order of December

17, 1987 was vacated on the same day (Slip Opinion, p. 9).

22. The effect of these repetitive and frivolous Motions in the Superior Court was to cause increased costs to the Appellees for attorneys fees, Sheriff's costs (including locksmith and moving expenses) and to delay the Sheriff's eviction.

23. These Motions at 1694 PGH 1987 and 1715 PGH 1987 were taken solely for the purpose of delay, having been previously denied at 1411 PGH 1987.

24. The Appellants-Plaintiffs' conduct was obdurate and vexatious, because they received initial stays on their Motions to Superior Court solely because they did not clearly advise the Court of the prior Orders denying the same request.

WHEREFORE, the Appellees respectfully request this Honorable Court to order:

a) Appellants to pay the reasonable counsel fees of Appellee in opposing the various Motions filed at 1694 PGH 1987 and 1715 PGH 1987, or a reasonable multiplier thereof;

b) Appellants to pay all of the reasonable counsel fees of Appellees in preparing this Application;

c) Appellants to pay all of the reasonable counsel fees of Appellees and all of the costs involved, in rescheduling the Sheriff's eviction as a result of the various Motions, and

d) that the amount of said fees be taxed in the lower court at GD87-13537, pursuant to Pa. R.A.P. 2761.

ROTHMAN, GORDON,
FOREMAN and
GROUDINE, P.C.

By: /s/ RONALD G. BACKER, ESQUIRE
Ronald G. Backer, Esquire

Counsel for the Appellees